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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

In re Thomas R. Hutchinson, individually and as the Personal Representative of the Estate of Robert W. Hutchinson, deceased, and Anne E. Hutchinson, individually,

Petitioners.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED FOR REVIEW

Whether mandamus is an appropriate means of reviewing a judge's refusal to disqualify himself under 28 U.S.C. § 455 (a) or § 455(b)(1).

Whether public confidence in the judicial process is undermined by the summary denial of a petition for writ of mandamus seeking review of a judge's refusal to disqualify himself under § 455(a) or § 455 (b)(1).

Whether appellate judges who summarily denied a mandamus petition seeking review of a district judge's refusal to disqualify himself under § 455(a) or § 455(b)(1) should have disqualified themselves after they obtained actual knowledge of facts indicating their bias or interest.

Whether interlocutory rulings entered by a judge whose recusal is mandated by § 455 should be vacated if they favor the party favored by his bias, prejudice or partiality.

TABLE OF CONTENTS

ORDERS BELOW 1

JURISDICTION 3

CONSTITUTIONAL PROVISIONS, STATUTES, AND PROCEDURAL AND COURT RULES INVOLVED 3

STATEMENT OF THE CASE 4

Basis for federal jurisdiction 4

Facts material to consideration of questions presented 5

Nexus between pending cases and prior litigation 5

"Extrajudicial sources" of the district and appellate judges' bias and partiality 7

Factual basis for petitioners' bias and partiality motion in the District Court 11

Relief sought in the Seventh Circuit 17

REASONS FOR ISSUANCE OF THE WRIT 18

1. Mandamus is appropriate where a judge refuses to disqualify himself under 28 U.S.C. § 455 18

   a. Adequate relief cannot be obtained from any other federal court or in any other form 19

b. The writ will be in aid of the Court's appellate jurisdiction 26

c. Exceptional circumstances which are present warrant exercise of the Court's discretionary power 30

2. Public confidence in the federal courts will be undermined if the Court does not require appellate judges to identify the basis for their denying mandamus petitions seeking review of district court decisions against recusal 33

a. The purpose of § 455(a) is to promote public confidence in the judiciary 33

b. Suspicions and doubts about the impartiality of a federal judge cannot be quelled if this Court does not require more of courts asked to review § 455 decisions than summary dispositions 34

3. Disqualification is required under § 455 where the facts tend to show not just adverse rulings, but bias, prejudice, or partiality 39

a. Appellate review of adverse rulings will not cure the Court of Appeals' failure to provide petitioners with a neutral and detached judge in the first instance 42

b. The Court should revisit Liteky and establish a standard which

District and Circuit Courts can use to gauge whether particular judicial rulings constitute valid grounds for a bias or partiality motion under § 455 45

(1) Judicial rulings alone which show requisite degree of favoritism or antagonism for disqualification 50

(2) Rulings and accompanying opinions which satisfy Liteky standard for recusal 52

4. The respondent judges should have recused themselves under § 455(a) . . 54

a. Judges Kanne and Easterbrook can be identified with two decisions alleged to be the "extrajudicial sources" of the unreasoning bias and prejudice that was exhibited by the successor district judge . 55

b. Respondents' impartiality was placed in issue when they did not take into consideration a Reply Brief petitioners filed before denying their mandamus petition 60

c. When petitioners sought a rehearing, respondents had actual knowledge of the facts alleged to indicate their interest or bias 61

5. Vacatur of respondents' orders and those entered by the Chief Judge and his successor in the defendants' favor is proper 63

CONCLUSION 65

APPENDIX:

Court of Appeals Order denying Petitions for Writ of Mandamus 1a

Court of Appeals Order granting leave to file Petitioners' Reply Brief 3a

Court of Appeals Order denying Petition for Rehearing 4a

SEPARATE APPENDIX:

District Court Order on Motion for Recusal of Presiding Judge, Nos. EV 90-43-C and EV 90-44-C 5a

District Court Order on Motion to Disqualify [Counsel], No. EV 90-43-C 27a

District Court Order on Motion to Disqualify [Counsel], No. EV 90-44-C 42a

District Court Order on Various Motions, No. EV 90-44-C 70a

District Court Order [granting motions of defendants and non-parties for protective order], No. EV-90-43-C 72a

District Court Order Staying Proceedings, No. EV 90-44-C 75a

District Court Order Lifting Stay on Discovery, No. EV 90-43-C 77a

District Court Order regarding intent to leave Judge McKinney's Stay in place, No. EV 90-44-C 83a

Opinion of Seventh Circuit in Godlove v. Bamberger, Foreman, Oswald and Hahn 85a

Constitutional Provisions, Statutes, and Procedural and Court Rules Involved

United States Constitution, Amendment V 104a

28 U.S.C. § 455 . . . . . 104a

28 U.S.C. § 2106 . . . . . 108a

Fed. R. Civ. P., Rule 16(b) 108a

Fed. R. Civ. P., Rule 55 . . . . . 109a

Fed. R. Civ. P., Rule 56 . . . . . 111a

Indiana Rules of Professional Conduct, Rule 3.7 . . . . . 114a

TABLE OF AUTHORITIES

Cases:

In re Aetna Casualty and Surety Co., 919 F.2d 1136 (6th Cir. 1990) 18

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 34, 54, 60

Alexander v. Primerica Holdings, Inc., 10 F.3d 155 (3d Cir. 1993) 18

Ex parte American Steel Barrel Co., 230 U.S. 35 (1913) 25, 50, 51, 61

Arizona v. California, 460 U.S. 605 (1983) 28

In re Barry, 946 F.2d 913 (D.C. Cir. 1991) 19

Bell v. Chandler, 569 F.2d 556 (10th Cir. 1978) 19

Berger v. United States, 255 U.S. 22 (1921) . . . 20, 21, 31, 32, 44, 50, 51

Berkshire Employees Association of Berkshire Knitting Mills v. National Labor Relations Board, 121 F.2d 235 (3d Cir. 1941) 60

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) 19

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 6

In re Cement Antitrust Litigation, 673 F.2d 1020 (9th Cir. 1982) 19

City of Mobile v. Grayson, 220 Ala. 349, 125 So. 221 (1929) 57, 58

Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California, Inc., 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) 43

In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980) 18

Godlove v. Bamberger, Foreman, Oswald and Hahn, No. EV 85-192-C (S.D. Ind. July 7, 1989) . . 8, 9, 10, 56, 58, 61, 62

Godlove v. Bamberger, Foreman, Oswald and Hahn, 903 F.2d 1145 (7th Cir. 1991) . . 2, 8, 9, 10, 56, 58, 59, 61, 62

In re Huntington Commons Associates, 21 F.3d 157 (7th Cir. 1994) 40, 41, 42, 44, 47

In re IBM Corporation, 618 F.2d 923 (2d Cir. 1980) 18

Kerr v. United States District Court, 426 U.S. 394 (1976) 19

Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc., 991 F.2d 1249 (7th Cir. 1993) . . . 27, 29

Liddell v. Board of Education, 677 F.2d 626 (8th Cir. 1982) 18

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 845 (1988) 27, 32-35, 37, 38, 62, 63

Liteky v. United States, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) . 34-36, 40-42, 45-52, 55-56, 61, 63

In re Murchison, 349 U.S. 133 (1955) 44, 58, 59

Offutt v. United States, 348 U.S. 11 (1954) 38

Peacock Records, Inc. v. Checker Records, Inc., 430 F.2d 85 (7th Cir. 1970) 46, 64

Public Utilities Commission of D.C. v. Pollak, 343 U.S. 451 (1952) 38

Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978) 59

In re Rodgers, 537 F.2d 1196 (4th Cir. 1976) 18

Russell v. Lane, 890 F.2d 947 (7th Cir. 1989) 59

SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977) 18

In re School Asbestos Litigation, 977 F.2d 764 (3d Cir. 1992) . . 20, 21, 22, 27

Spangler v. Sears, Roebuck and Co., 759 F.Supp. 1327 (S.D. Ind. 1991) . . . 37

Tumey v. Ohio, 273 U.S. 510 (1927) . . . 45

In re United States, 666 F.2d 690 (1st Cir. 1981) 18

United States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985) 29

United States v. Bertoli, 40 F.3d 1384 (3d Cir. 1994) 41, 42, 44, 47

United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994) . . 41, 42, 48

United States v. Grinnell Corp., 384 U.S. 563 (1966) 50

United States v. Harris, 558 F.2d 366 (7th Cir. 1977) 38

United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985) 65

United States v. Sykes, 7 F.3d 1331 (7th Cir. 1993) 55

United States v. Torkington, 874 F.2d 1441 (11th Cir. 1989) 63

United States v. Towns, 913 F.2d 434 (7th Cir. 1990) 27

Walberg v. Israel, 766 F.2d 1071 (7th Cir. 1985) 55

Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972) 42, 43, 54

Webbe v. McGhie Land Title Co., 549 F.2d 1358 (10th Cir. 1977) . . . 53, 54, 61

Will v. United States, 389 U.S. 90 (1967) 19

United States Constitution:

U.S. Const. amend. V 26, 32, 37

Statutes:

28 U.S.C. § 144 . . . . . 21, 27

28 U.S.C. § 455 . . . . . passim

28 U.S.C. § 455(a) . . . . . passim

28 U.S.C. § 455(b)(1) . . . . . passim

28 U.S.C. § 455(e) 39

28 U.S.C. § 1292(b) 21

28 U.S.C. § 1332 4

28 U.S.C. § 1651(a) . . 3, 17, 19, 23, 25

28 U.S.C. § 1927 . . . . . 16, 53

28 U.S.C. § 2106 18

Court rules:

Fed. R. App. P. 35(b) 24

Fed. R. App. P. 40 24

Fed. R. Civ. P. 11 . . . . . 16, 53

Fed. R. Civ. P. 12(b) 17

Fed. R. Civ. P. 16(b) 16

Fed. R. Civ. P. 33 10

Fed. R. Civ. P. 34 10

Fed. R. Civ. P. 36 10

Fed. R. Civ. P. 37(d) 15

Fed. R. Civ. P. 55 17

Fed. R. Civ. P. 56(a) 17

Ind. R. Prof. Resp. 3.7 . . . . . 8, 14

Ind. R. Prof. Resp. 3.7(a) 13

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PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully request that a writ of mandamus issue to review orders which were entered in In re Hutchinson, No. 94-1523[1] by three judges who sit on the United States Court of Appeals for the Seventh Circuit.[2]

ORDERS BELOW

Petitions for writs of mandamus which petitioners filed in the United States Court of Appeals for the Seventh Circuit

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[1] Parties to the mandamus proceeding in the Court of Appeals were Thomas R. Hutchinson and Anne E. Hutchinson, plaintiffs-petitioners; the Hon. Larry J. McKinney, respondent; and defendants-respondents Gordon Terhune Thompson, Margaret Ann Thompson Lynch, Ira Spanierman, Ira Spanierman, Inc., William E. Jageman, Jageman and McGraw, Inc., Robert H. Hahn, Bamberger, Foreman, Oswald and Hahn, and Rita Deere.

[2] These three judges are persons against whom relief is sought in this Court. Their names are Hon. Richard D. Cudahy, Hon. Frank H. Easterbrook, and Hon. Michael S. Kanne; each is a Circuit Judge in the United States Court of Appeals for the Seventh Circuit.

on January 25[3] and March 11, 1994, were disposed of by unpublished order on August 5, 1994. This order is reprinted in the appendix at 1a - 2a. The court's order directing the clerk to file petitioners' tendered reply brief was entered July 27, 1994; it is reprinted in the appendix at 3a. The petition for rehearing was denied by order dated October 14, 1994; it is reprinted in the appendix, at 4a.

Orders rendered by the district court in the underlying civil actions are not reported, but are reprinted in the separate appendix, at 5a - 84a.

The Seventh Circuit opinion in Godlove v. Bamberger, Foreman, Oswald and Hahn is reported at 903 F.2d 1145 and reprinted in the separate appendix, at 85a - 103a.

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[3] This mandamus petition sought review of the district judge's order disqualifying petitioners' counsel under the advocate-witness rule. This Court is not being asked to determine whether that ruling was "right or wrong."

JURISDICTION

This Court may exercise its original jurisdiction under 28 U.S.C. § 1651(a) to review an appellate panel's summary denial of a mandamus petition seeking review of a district judge's refusal to disqualify himself and its order denying the petition for rehearing which petitioners filed.

CONSTITUTIONAL PROVISIONS, STATUTES AND PROCEDURAL AND COURT RULES INVOLVED

United States Constitution:

Amendment V

United States Code, Title 28:

§ 455. Disqualification of justice, judge or magistrate

§ 1651. Writs

§ 2106. Determination

Federal Rules of Civil Procedure:

Rule 16. Pretrial Conferences; Scheduling; Management

Rule 55. Default

Rule 56. Summary Judgment

Indiana Rules of Professional Conduct:

Rule 3.7. Lawyer as Witness

STATEMENT OF THE CASE

The underlying civil actions were filed in the United States District Court for the Southern District of Indiana on April 2, 1990. The relief sought in the first of these actions was an order vacating a 1988 judgment for fraud upon the court. In the second, petitioners asserted fraud and malpractice claims against law firms and lawyers who had represented them in the prior litigation and fraud and RICO claims against a New York art dealer who had been a defendant in that litigation.

Basis for Federal Jurisdiction

The subject matter jurisdiction of the United States District Court for the Southern District of Indiana was invoked under 28 U.S.C. § 1332. Petitioners Anne E. Hutchinson and Thomas R. Hutchinson were citizens of the State of Washington when the pending cases were filed. Those

named defendants were citizens of other states: Robert H. Hahn, Rita Deere, and members of Bamberger, Foreman, Oswald and Hahn, a partnership, were citizens of Indiana, as was Gordon Terhune Thompson and Ann Thompson Lynch's predecessor in interest; William E. Jageman was a citizen of California, as was Jageman and McGraw, Inc., a dissolved corporation; Ira Spanierman was a citizen of New York, as was Ira Spanierman, Inc., a dissolved corporation. The amount in controversy in each case exceeded $50,000.00.

Facts Material to Consideration of the Questions Presented

Nexus between pending cases and prior litigation

In 1980, petitioners' father, Robert Hutchinson ["Hutchinson"], filed a partition action against his cousin, Margaret Thompson ["Thompson"], to enforce a right recognized under Indiana law: division of personal property they held as tenants in

common. The following year, New York art dealer Ira Spanierman and Ira Spanierman, Inc. were joined as defendants so paintings and other objects from the Theodore Robinson Collection[4] which the art dealer had obtained from Thompson without her cotenant's knowledge or consent, could be divided and set off in severalty.

In 1988, the Chief Judge of the United States District Court for the Southern District of Indiana ruled on dispositive motions the art dealer and Thompson filed in 1981 and 1982, decided that abstention under Burford v. Sun Oil Co., 319 U.S. 315 (1943), was appropriate, and dismissed the partition action.

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[4] What is referred to in the prior and pending litigation as "the Theodore Robinson Collection" consists of more than 200 works of art created or owned by Theodore Robinson, foremost of American Impressionist artists and a close friend of Claude Monet, at the time of his death. The collection was inherited by Hamline Robinson, the artist's older brother and one of his heirs.

Robert H. Hahn ["Hahn"], the lawyer who represented Hutchinson in that litigation, dissuaded petitioners from appealing the dismissal by telling them that pursuing such a course could subject their father's estate to the imposition of sanctions.

In March 1990, when petitioners learned of Ira Spanierman's announced intention to publish a catalogue raisonné of Robinson's works and became suspicious of representations Hahn had made in 1988, they located then contacted Joan Godlove ["Godlove"], who had served as their father's lawyer between January 1981 and July 1983, when she was fired by the Bamberger, Foreman, Oswald and Hahn ["Bamberger"] firm. The pending actions were filed several weeks later.

"Extrajudicial sources" of the district and appellate judges' bias and partiality

After being served with suit papers, the petitioners' former lawyer and his law

firm asked the Chief Judge to disqualify Godlove under the advocate-witness rule, Ind. R. Prof. Conduct 3.7, and enter "an order precluding [her] or any other attorney associated with the firm of Roberts, Marrs & Carson from acting as an advocate for or counsel to plaintiff in any matter relating to the claims asserted or which may be asserted . . . ."

Attached to Hahn's affidavit, which was filed in support of the Bamberger firm's motion, were copies of opinions rendered in Godlove v. Bamberger, Foreman, Oswald and Hahn, No. EV 85-192-C (S.D. Ind. July 7, 1989), by the Hon. William L. Beatty[5] and the Seventh Circuit, No. 89-2722 (7th Cir. 1990), reprinted at 903 F.2d 1145, cert. denied, 499 U.S. 913 (1991).

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[5] Judge Beatty, United States District Judge for the Southern District of Illinois, was assigned to this case after every judge in the Southern District of Indiana recused himself or herself sua sponte. 903 F.2d at 1145 n.*.

Because each of the Godlove opinions was critical[6] of petitioners' counsel, but contained no finding or holding[7] that was relevant to issues raised by defendants' motions[8] to disqualify Godlove under the advocate-witness rule, petitioners identified them as "extrajudicial sources" of the prejudice displayed by the successor

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[6] The author of the Seventh Circuit opinion dubbed Godlove "a fool" and trivialized her request that the Bamberger firm be required to notify its clients, including petitioners, of her asserting the attorney-client privilege and work-product doctrine on their behalf (separate appendix at 86a, 94a) so she could determine whether each would consent to disclosure of the information sought.

[7] Each opinion focused on Godlove's failure to produce documents which she had claimed were protected by the attorney-client privilege and work-product doctrine and the dismissal of her retaliatory discharge action as the ultimate discovery sanction.

[8] In March 1991, Spanierman filed a motion in the fraud on the court case in which he adopted the Bamberger firm's motion to disqualify petitioners' counsel. He and William E. Jageman, another of petitioners' former lawyers, as well as Jageman's firm, filed similar motions in the second case later that year.

district judge,[9] when they sought his disqualification under 28 U.S.C. § 455(a) and § 455(b)(1) in April 1993.

Circuit judges who are the subject of the instant petition were asked to find that the trial and appellate opinions in Godlove v. Bamberger, Foreman, Oswald and Hahn constituted "extrajudicial sources" of the district judge's bias and prejudice then issue a writ requiring his recusal. Two of those judges, the Honorable Frank H. Easterbrook and the Honorable Michael S. Kanne, had participated in the Seventh Circuit's decision in Godlove. They were being asked to determine an issue of fact in which each had a personal interest.

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[9] The Chief Judge disqualified himself sua sponte under § 455(b)(1) in December 1991, seven months after he entered a series of ex parte orders relieving defendants of their duty to respond to discovery requests served on them under Rules 33, 34, and 36 of the Federal Rules of Civil Procedure until 30 days after he ruled on their motions to disqualify Godlove.

Factual basis for petitioners' bias and partiality motion in the District Court

The following facts (which tend to show not just adverse rulings, but bias or partiality) were asserted as grounds for the successor district judge's recusal:

1. Although the judge denied Ira Spanierman's motion to disqualify Godlove in the fraud on the court case, he stressed that Godlove, Roberts and Marrs were to conduct no discovery which is to be utilized in the malpractice and fraud case (separate appendix at 40a).

2. In the order denying Ira Spanierman's disqualification motion, the judge also "put[] plaintiffs' counsel on notice that if it comes to their attention that any of the four are likely to be called as a witness, plaintiffs' counsel must withdraw from the case immediately (separate appendix at 40a).

3. When the judge asked petitioners' counsel "to consider carefully whether attorney Godlove will be called as a witness -- either during the plaintiff's case in chief, in rebuttal, or reasonably by defendants in their case in chief," (separate appendix at 40a), he ignored evidence in the record in that case, namely:

> Counsel for the Spanierman defendants have never stated on the record or told plain-

tiff's counsel (a) that they intend to call any of the attorneys who are the targets of their clients' Motion to Disqualify Counsel (i.e., Joan Godlove and other attorneys associated with Roberts, Marrs and Carson) to testify on behalf of their clients at trial or (b) that testimony they expected to elicit from plaintiff's counsel at trial, if defendants called them to testify, would be prejudicial to plaintiff's case.

Counsel for the Spanierman defendants has never informed plaintiff's counsel who he expects to elicit testimony from Ms. Godlove which "does not relate to an uncontested issue" or what "the testimony" is.

Plaintiff has no reason to call Joan Godlove or any other attorney associated with the Roberts, Marrs & Carson firm to testify at the trial of the underlying partition action, if the Court vacates the judgment in Hutchinson v. Day on the ground that it was obtained by fraud upon the court.

Plaintiff Thomas R. Hutchinson will not call his attorneys to testify on his behalf at the trial of the underlying partition action, if the Court vacates the judgment in Hutchinson v. Day for fraud

upon the court. However if the Court determines that specialized knowledge of the law applicable to partition actions "will assist the trier of fact to understand the evidence or to determine a fact in issue," Fed.R.Evid. 702, plaintiff will offer the testimony of an expert witness, not the testimony of one of his attorneys.

Even if Joan Godlove or another attorney associated with Roberts, Marrs & Carson was called to testify at trial by the Spanierman defendants' attorneys, the testimony plaintiff's lawyers could give would not be prejudicial to plaintiff's case.

None of plaintiff's attorneys has personal knowledge of the operative facts giving rise to plaintiff's underlying partition action or the conduct of one or more attorneys of record in Case No. EV 80-104-C, which constituted fraud upon the court.

4. Findings of fact set forth in the order disqualifying Godlove and two other attorneys in the second case establish that the movants had not sustained burdens placed on them by Rule 3.7(a) of the Indiana Rules of Professional Conduct as to plaintiff's malpractice, fraud and constructive fraud claims (separate appendix at 51a - 57a).

5. When defendants in the malpractice and fraud action failed to make the showing required by Rule 3.7, the judge disregarded that fact, then made an unsupported finding that the substance of a telephone call made in April 1990 was "in dispute" in order to conclude that Godlove and two other attorneys would have to testify about that call at trial and could not represent plaintiff on any claim (separate appendix at 57a - 59a, 65a). To draw this conclusion, the judge disregarded sworn statements in the record that Tom Hutchinson had no reason to call Godlove to testify in that case; that she would not testify as a witness for him; and that if she was called by any defendant, her testimony would not be prejudicial to her client.

6. The district judge denied the pro se litigants' motion to reconsider and vacate his order disqualifying Godlove, and then directed them to respond to the summary judgment motion Hahn and the Bamberger firm filed three weeks after the judge had deprived Hahn's former clients of counsel (separate appendix at 70a). The summary nature of the ruling does not disclose the basis for the judge's decision or if consideration was given to grounds advanced in support of the motion to reconsider:

   (a) in making its decision, the court did not consider petitioners' motion or reply brief;

(b) the court's conclusion that Godlove must be disqualified as to the malpractice and RICO claims is not supported by evidence in the record; and

(c) justice and fair play require that the order disqualifying Godlove on grounds that "she was likely to be a necessary witness at trial" be vacated so that petitioners would not be forced to proceed pro se by economic constraints, but could be represented by counsel on the summary judgment motion Hahn and his law firm filed three weeks after the court entered that order.

7. When the judge denied Plaintiff's Motion to Vacate Orders Staying Discovery, he accepted, as valid, ex parte orders staying discovery which the Chief Judge entered in 1991, in violation of petitioners' due process rights.

8. When the judge denied Plaintiffs' Second Motion for Relief Under Rule 37(d), he accepted, as valid, ex parte orders staying discovery which the Chief Judge entered in 1991 in violation of petitioners' due process rights.

9. When the judge continued the stay beyond the time contemplated by the Chief Judge's ex parte orders, without first consulting with the pro se petitioners by a scheduling conference, telephone, mail or other suitable means (separate

appendix at 77a - 79a [summary of ex parte stay orders]) he violated their due process rights and express provisions of Rule 16(b).

10. When, four weeks after lifting the ex parte stay entered by the Chief Judge in the fraud on the court case seventeen months earlier, the judge entered an ex parte order staying discovery until he ruled on the summary judgment motion in the malpractice case, he violated petitioners' due process rights (separate appendix at 72a - 74a).

11. The judge refused to take judicial notice of Plaintiff's Offer of Proof Regarding Motive for Perpetrating Fraud Upon the Court because it was signed by Godlove, not because he had reviewed the documentary evidence it contained and found it irrelevant.

12. In denying Plaintiff's Motion for Imposition of Sanctions Under Rule 11 and 28 U.S.C. § 1927 for Filing Frivolous Motions to Disqualify Counsel and Stay Discovery, the judge found that the defendants' motions to disqualify counsel were well-founded, as evidenced by his disqualification order, and that "plaintiff's request to stay discovery is extraneous, given that all discovery is already stayed." The latter finding discloses that the judge based his ruling on the title of plaintiff's motion. [His later effort to explain this ruling, i.e., a critical phrase had been inadvertently deleted, (separate appendix at 20a - 22a) raises

other questions under § 455.][10]

13. Two motions for entry of default and entry of default judgment under Rule 55 were filed after Ira Spanierman failed to respond to pleadings filed in the fraud on the court case within the time allowed, first by order, then by Rule 12(a)(4)(A). None of these motions was granted. With regard to the first set, the successor judge permitted Spanierman to file a Rule 12(b) motion out of time.

14. Although he required petitioners to respond to a motion to dismiss which he allowed Spanierman to file after he was in default, the successor judge indefinitely extended the time for Spanierman to respond to a Rule 56(a) motion which petitioners initially filed in the fraud on the court case on March 13, 1991, and then renewed November 30, 1992.

Relief sought in the Seventh Circuit

The writ petitioners asked the Seventh Circuit to enter under 28 U.S.C. § 1651(a) would have compelled the successor judge

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[10] Page limitations prevent petitioners from describing additional manifestations of alleged bias or prejudice which arise from rulings and comments made by the successor judge after he was asked to disqualify himself.

to disqualify himself and vacate orders he had entered in defendants' favor.

Relief which petitioners sought under 28 U.S.C. § 2106 was an order vacating a series of ex parte orders which the Chief Judge entered before disqualifying himself under 28 U.S.C. § 455(b)(1).

REASONS FOR ISSUANCE OF THE WRIT

1. Mandamus is appropriate where a judge refuses to disqualify himself under 28 U.S.C. § 455.

Most circuit courts have held that mandamus is an appropriate means of reviewing a judge's refusal to disqualify himself.[11]

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[11] See, e.g., In re United States, 666 F.2d 690, 694 (1st Cir. 1981); In re IBM Corp., 618 F.2d 923, 926-27 (2d Cir. 1980); Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 163 (3d Cir. 1993); In re Rodgers, 537 F.2d 1196, 1197 n.1 (4th Cir. 1976); In re Corrugated Container Antitrust Litig., 614 F.2d 958, 961 n.4 (5th Cir.), cert. denied, 449 U.S. 888 (1980); In re Aetna Casualty and Surety Co., 919 F.2d 1136, 1139-43 (6th Cir. 1990) (en banc); SCA Services, Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977); Liddell v. Board of Educ., 677 F.2d 626, 643 (8th Cir.), cert. denied sub nom Missouri v. Liddell, 459

The issue is one of first impression for this Court, however.

a. **Adequate relief cannot be obtained from any other federal court or in any other form.**

Petitioners acknowledge they must not only show a "clear and indisputable" right to issuance of the writ, Will v. United States, 389 U.S. 90, 96 (1967), but also have no other adequate means to obtain the desired relief, Kerr v. United States District Court, 426 U.S. 394, 403 (1976). Still, exercise of this or any other appellate court's power under the All Writs Act, 28 U.S.C. § 1651(a) (1994), is largely discretionary. Kerr v. United States District Court, 426 U.S. at 403.

U.S. 877 (1982); In re Cement Antitrust Litig., 673 F.2d 1020, 1025 (9th Cir. 1982), cert. denied for want of quorum, 459 U.S. 1190 (1983); Bell v. Chandler, 569 F.2d 556, 559 (10th Cir. 1978); In re Barry, 946 F.2d 913, 914 (D.C. Cir. 1991) (dictum). Presumably the Eleventh Circuit would follow pre-split precedents of the Fifth Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1209-11 (11th Cir. 1981).

Courts considering the question have rejected the notion that interlocutory and final appeals provide a presumptively adequate means of reviewing disqualification decisions. See, e.g., In re School Asbestos Litigation, 977 F.2d 764 (3d Cir. 1992), where the rationale underlying the court's decision was explained as follows:

> [W]e believe section 455 reflects Congress's view that the adjudication of a case by a judge with an actual or apparent bias is an "abuse of judicial power," Roche [v. Evaporated Milk Association, 319 U.S. 21,] 31 [(1943)], because it is a threat to the integrity of the judicial system. Interlocutory review of disqualification issues on petitions for mandamus is both necessary and appropriate to ensure that judges do not adjudicate cases that they have no statutory power to hear . . . .

977 F.2d at 778 (emphasis in original).

The adequacy of an appeal from a final judgment entered by a judge who should have disqualified himself under Section 25 of the Judicial Code was considered and decided by the Court in Berger v. United

States, 255 U.S. 22 (1921), in the course of answering questions certified by the Seventh Circuit:

> The remedy by appeal is inadequate. It comes after the trial and if prejudice exist it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of mind in which there is a personal ingredient.

255 U.S. at 36.

What was said in Berger under the predecessor to 28 U.S.C. § 144 should be equally applicable today under 28 U.S.C. § 455: the remedy by appeal from a final judgment is inadequate.

Nor does interlocutory appeal under 28 U.S.C. § 1292(b) appear to be an adequate remedy for a district judge's refusal to disqualify himself. As the Third Circuit noted in In re School Asbestos Litigation:

> All three of [the] requirements [imposed by § 1292(b)] pose obstacles to the use of interlocutory appeal to review a district judge's refusal to disqualify himself or herself.

> Perhaps in some cases the necessity of disqualification can be deemed a "controlling question of law," notwithstanding that it is a fact-intensive, somewhat discretionary issue collateral to the merits. Even so, a district judge's refusal to disqualify necessarily indicates a belief that his or her partiality cannot reasonably be questioned. In many, if not all, cases that will in turn suggest that the district judge believes that there is no "substantial ground for difference of opinion" regarding the need to disqualify. Furthermore, disqualification may slow, not speed, the progress of a case to final judgment. Finally, as a practical matter, some district judges may consider a demand for disqualification as a personal attack (even if the motion is not meant as such) and may, therefore, be less inclined to certify the issue if they believe that disqualification is not required.

977 F.2d at 777; see also Wesley Kobylak, Annot., Review of Federal Judge's Grant or Denial of Motion to Recuse, 64 A.L.R. Fed. 433, 439 (1983) ("while interlocutory appeal is generally not available in the context of recusal motions, the rare cases in which it has been granted are uniformly where the recusal has been granted").

What has been said thus far relates to review of a district judge's refusal to disqualify himself or herself, not the refusal of circuit judges to do likewise.

The petitioners have exhausted remedies available to them in the district and circuit courts. They filed a motion seeking disqualification of the successor judge under § 455(a) or § 455(b)(1). Upon his refusal to recuse, they sought review of his decision in the Seventh Circuit under 28 U.S.C. § 1651(a). After their mandamus petition was denied summarily, they filed a petition for rehearing and suggestion for rehearing in banc which raised the following issues, among others:

> Public confidence in the judiciary will be undermined unless this Court identifies the basis for its denial of the March 11, 1994, petition and explains why none of the grounds asserted required disqualification.
>
> The Court appears to have overlooked qualifying language in Liteky and mistakenly concluded that judicial rulings cannot form the basis for a § 455 motion but should be appealed.

The Court's impartiality "might reasonably be questioned" under 28 U.S.C. § 455(a) where it decided issues the parties raised in their Petition and Response without first considering Petitioners' Reply Brief and related appendix.

Two of the three judges who entered the Order should have disqualified themselves under 28 U.S.C. § 455(a) upon learning that they were being asked to find that their prior opinion in Godlove v. Bamberger, Foreman, Oswald and Hahn constituted an "extrajudicial source" for Respondent's unreasoning prejudice.

Disqualification of the third member of the panel which entered the Order may be necessary to avoid the appearance of impropriety.

Respondent Judges Cudahy, Easterbrook, and Kanne refused petitioners relief under 28 U.S.C. § 455 and Rule 40 of the Federal Rules of Appellate Procedure by declining to disqualify themselves and denying their petition for rehearing. By their silence and inaction, the remaining members of the Seventh Circuit denied petitioners relief available to them under yet another rule of appellate procedure, i.e., a rehearing in banc. See Fed.R. App.P. 35(b).

The only remaining avenue of relief is review by this Court under the All Writs Act of (1) the orders entered by Circuit Judges Cudahy, Easterbrook and Kanne denying petitioners' mandamus petition and petition for rehearing and (2) "facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice," Ex parte American Steel Barrel Co., 230 U.S. 35, 43-44 (1913), or partiality on the part of the trial and appellate judges.

Like Napoleon III who ordered an exhibition of the works of the Impressionists who had been "refused wall space at the official, aridly academic biennial Salon shows in Paris . . . -- the Salon des Refusés -- so that the excluded works might have a public showing,"[12] this Court

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[12] Helen Dudar, Impressionism's hard yet glorious formative years, 25 Smithsonian 79, 79 (Nov. 1994).

should grant petitioners' writ and order a kind of "legal salon de refusés"[13] so that arguments made, but rejected by four federal judges, i.e., that petitioners have been deprived of rights guaranteed them by the Fifth Amendment and 28 U.S.C. § 455, might have a public hearing.

b. **The writ will be in aid of the Court's appellate jurisdiction.**

Unless the Court exercises its original jurisdiction at this time, the petitioners will be unable to invoke its appellate jurisdiction at a later date. The reasons for this are six in number.

First, with regard to appellate review of orders denying partiality motions, the Seventh Circuit adheres to a "mandamus-or-

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[13] The quoted phrase should not have been used to describe the Court's denial of more than 1600 petitions for writ of certiorari last October. Compare Linda Greenhouse, High Court Opens Its Fall Season by Refusing Cases, N.Y. Times, Oct. 4, 1994, at A4 with article cited in footnote 12, supra.

nothing" approach.[14] See In re School Asbestos Litig., 977 F.2d 777 n.12. It permits post-final-judgment appeals in cases of actual or imputed bias under 28 U.S.C. §§ 144 and 455(b)(1), but refuses to hear them for appearance-of-partiality claims under § 455(a). Id. (citing Durhan v. Neopolitan, 875 F.2d 91, 96-97 (7th Cir. 1989); United States v. Balistrieri, 779 F.2d 1191, 1204-05 (7th Cir. 1985)). But see Liljeberg v. Health Services Acquisition Corp., 486 U.S. 845, 862-69 (1988) (affirming vacatur of final judgment on Rule 60 motion for new trial based on district judge's failure to disqualify himself under 28 U.S.C. § 455(a)).

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[14] Indeed, that court has held that the issue of whether a judge should have recused himself under § 455(a) is waived if not raised in a mandamus action. See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc. ["Lac Du Flambeau Indians"], 991 F.2d 1249, 1955 (7th Cir. 1993); United States v. Towns, 913 F.2d 434, 443 (7th Cir. 1990) (collecting cases).

The second as well as the third reason petitioners will be unable to invoke this Court's appellate jurisdiction are related to the first. Reason number two is that the district judge did not decide if disqualification was mandated under 28 U.S.C. § 455(b)(1), as petitioners asked him to do; instead, he specifically limited his ruling to whether § 455(a) required his recusal (separate appendix at 7a - 8a).

Reason number three is that, having unsuccessfully challenged the successor district judge's refusal to disqualify himself under § 455(a) in a mandamus action, petitioners are precluded by the Seventh Circuit's "mandamus-or-nothing" rule and the law of the case doctrine[15]

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[15] Although an amorphous concept, the law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618 (1983).

from pressing the same issue on a post-final-judgment appeal.

The fourth and fifth reasons issuance of the writ would be in aid of the Court's appellate jurisdiction are linked to one another; they, in turn, are related to reason number two.

Reason number four concerns the failure of Circuit Judges Cudahy, Easterbrook, and Kanne to subject the trial judge's refusal to recuse for actual or imputed bias under § 455(b)(1) to de novo review, as Seventh Circuit practice dictates.[16] Two inferences can be drawn from this fact. First, they did not consider whether disqualification under § 455(b)(1) was mandated. Second, they rejected, albeit silently, petitioners' argument that the district

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[16] See, e.g., United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985), cert. denied sub nom. DiSalvo v. United States, 475 U.S. 1095 (1986); accord, Lac Du Flambeau Indians, 991 F.2d at 1255.

judge lacked discretion to limit his analysis of their motion to § 455(a).

Reason number five is that although petitioners are not barred by Seventh Circuit precedent from raising the issue of whether recusal was mandated under § 455(b)(1), the law of the case doctrine may serve as a bar to meaningful reconsideration of that issue on appeal.

The sixth and final reason issuance of the writ will be in aid of this Court's appellate jurisdiction relates to the fact that the issue of whether Judges Cudahy, Easterbrook, and Kanne should have recused themselves will be moot if not considered and decided now.

c. **Exceptional circumstances which are present warrant exercise of the Court's discretionary power.**

Subsequent to the denial of their petition for rehearing, petitioners learned that the actions which have been pending

in the United States District Court for the Southern District of Indiana since April 1990 have now been transferred to a third district judge, one who was recently appointed to the federal bench. They have also been given notice that, unless persuaded otherwise, he intends to leave in place the ex parte stay order[17] which his predecessor entered August 17, 1993 (separate appendix at 83a - 84a), concurrent with the order which denied petitioners' § 455 motion.

Numerous interlocutory orders, including ex parte discovery, scheduling, and stay orders, which the Chief Judge and his successor entered between April 1991 and August 1993, have now been "fortified by presumptions," Berger v. United States,

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[17] This ex parte order stayed all proceedings in the malpractice and RICO action until after a final decision is rendered in the fraud on the court case (separate appendix at 75a - 81a).

255 U.S. at 36, as a result of the summary disposition of the petition for writ of mandamus and petition for rehearing which petitioners filed in the United States Court of Appeals for the Seventh Circuit.

If, as petitioners contended in the District Court and the Court of Appeals, those and other orders were entered by the Chief Judge and his successor in violation of § 455 or their Fifth Amendment right to "due process," appropriate remedies should be fashioned by this Court[18] or by circuit judges whose impartiality cannot "reasonably be questioned," 28 U.S.C. § 455, so justice can be accomplished and public confidence in the judicial process can be restored.

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[18] The task of fashioning remedies that will best serve the purpose of § 455 has been delegated to the judiciary. Liljeberg, 486 U.S. at 862. In many cases, the Court of Appeals "is in a better position to evaluate the significance of a violation than this Court." Id. This, however, may not be one of those cases.

2. **Public confidence in the federal courts will be undermined if the Court does not require appellate judges to identify the basis for their denying mandamus petitions seeking review of district court decisions against recusal.**

Far more is at stake here than whether decisions made by four federal judges are legally supportable under § 455. At issue is the integrity of the judicial process and whether this Court will exercise its supervisory powers to promote or restore confidence in the federal courts.

a. **The purpose of §455(a) is to promote public confidence in the judiciary.**

Concerns about judicial integrity, particularly suspicions and doubts held by those who have not served on the bench,[19] find expression in § 455(a), the purpose of which "is to promote confidence in the judiciary by avoiding even the appearance

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[19] These concerns also have a constitutional dimension. See Liljeberg, 486 U.S. at 864-64 & n.12 (citing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986)).

of impropriety whenever possible." Liljeberg, 486 U.S. at 865. "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986).

b. Suspicions and doubts about the impartiality of a federal judge cannot be quelled if this Court does not require more of courts asked to review § 455 decisions than summary dispositions.

To satisfy the appearance of justice and promote confidence in the judicial system, "it is critically important [for reviewing courts] to identify facts that might reasonably cause an objective observer to question [another federal judge's] impartiality" under § 455(a). Liljeberg, 486 at 865. This is not merely to be done in conference; those facts should see the light of day in reported decisions. Id. (implied). Only by airing them in public and applying the principles enunciated in Liteky v. United States, 114 S.Ct. 1147,

127 L.Ed.2d 474 (1994), and Liljeberg can confidence in the judicial process be promoted or restored, as the case may be.

Confining such facts or equally unimpressive allegations of bias or partiality to smoke filled rooms or smoke free environs will have just the opposite effect. For this Court to allay doubts about the impartiality of federal judges and "quell the concerns of the skeptic," Liljeberg, 486 U.S. at 865 n.12, it must ask more of Courts of Appeals called upon to review decisions against disqualification. Were it to allow respondents' summary disposition to stand, confidence in the judicial process would be eroded, not promoted.

Nothing in the Court's Liteky opinion suggests that decisions denying § 455(a) (or § 455(b)(1)) motions are to be given short shrift by an appellate court asked to review those decisions via post-final-judgment appeal or mandamus. What was said seems to counsel Courts of Appeals to

consider carefully, if not de novo, each factual ground asserted in a § 455 motion and other manifestations of alleged bias raised for the first time on appeal:

> Applying the principles we have discussed to the facts of the present case is not difficult. None of the grounds petitioners assert required disqualification. As we have described, petitioners' first recusal motion was based on rulings made, and statements uttered, by the District Judge during and after the 1983 trial; and petitioner Bourgeois' second recusal motion was founded on the judge's admonishment of Bourgeois' counsel and codefendants. In their briefs here, petitioners have referred to additional manifestations of alleged bias in the District Judge's conduct of the trial below, including the questions he put to certain witnesses, his alleged "antidefendant tone," his cutting off testimony said to be relevant to defendants' state of mind, and his post-trial refusal to allow petitioners to appeal in forma pauperis.

Liteky, 114 S.Ct. at 1157-58, 127 L.Ed.2d at 491.[20]

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[20] Those concurring in the judgment noted that the Court described "in all necessary detail the unimpressive allegations of partiality and the appearance thereof" in Liteky. 114 S.Ct. at 1163; 127 L.Ed.2d at 491.

Where, as in the present case, parties invoke different provisions of § 455 and the due process clause of the Fifth Amendment, then assert a number of grounds for disqualification, each of those grounds should be addressed and analyzed in the district court's opinion. See Spangler v. Sears, Roebuck and Co., 759 F.Supp. 1327, 1329-31 (S.D. Ind. 1991) (implied). Where review of an order against recusal under § 455 is sought, Courts of Appeals should follow the same procedure. See Liljeberg, 486 U.S. at 861 (implied).

Only by issuing the writ petitioners seek in this original action can the Court signal its willingness to enforce § 455 and further the purpose to be served by that statute. This, in turn, "may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly dis-

close them when discovered." Lilejeberg, 486 U.S. at 868.

If the administration of justice is to "reasonably appear to be disinterested as well as be so in fact." Public Utilities Comm'n of D.C. v. Pollak, 343 U.S. 451, 466-67 (1952) (Frankfurter, J., in chambers), the Court must expressly disapprove of the summary disposition of any decision against disqualification under § 455. "To sustain such a course of procedure would give it encouragement." Offutt v. United States, 348 U.S. 11, 15 (1954); cf. United States v. Harris, 558 F.2d 366, 374-75 (7th Cir. 1977) ("we should not adopt a rule which will have the natural and probable effects of encouraging trial judges to avoid giving reasons for sentencing decisions and diminishing the individual offender's confidence in the fairness and objectivity of a critical step in the criminal justice process").

Unless the Court requires respondents to identify their reasons for denying the mandamus petition and explain why none of the grounds alleged required the successor district judge to disqualify himself, the confidence of petititioners, as well as the American people, in the fairness and the objectivity of federal judges will be shaken to its very core.

3. **Disqualification is required under § 455 where the facts tend to show not just adverse rulings, but bias, prejudice, or partiality.**

As it now stands, the public and petitioners alike are left to speculate about why their mandamus petition was denied by Circuit Judges Cudahy, Easterbrook, and Kanne. One possibility[21] is that all three

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[21] A second explanation for the summary denial may be that the panel relied on arguments in defendants' Response, and then found, contrary to express provisions of § 455(e), that petitioners waived their right to ask the successor judge to disqualify himself under § 455(b)(1) or seek appellate review of his refusal to do so.

merely gave lip service to qualifying language found in Liteky and then concluded, as Judge Cudahy did in another post-Liteky decision, that "[a]dverse rulings should be appealed; they do not form the basis for a recusal motion." In re Huntington Commons Assoc., 21 F.3d 157, 158 (7th Cir. 1994) (Cudahy, J.) (emphasis added). But see Liteky, where language the Court used was couched in terms of grays, not black and white:

> [J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion. See United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extra-

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A third possibly is that respondents decided, as defendants urged them to do, that petitioners' § 455 motion or their mandamus petition was untimely. Related matters are addressed on pages 60 - 61, infra.

> judicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal.

114 S.Ct. at 1157, 127 L.Ed.2d at 490-91 (emphasis added).

Circuit Judge Cudahy and the Seventh Circuit are not alone in their reading of Liteky, at least insofar as it relates to the niche reserved for adverse judicial rulings in recusal jurisprudence. See United States v. Bertoli, 40 F.3d 1384, 1412, 1413 (3d Cir. 1994); United States v. Chischilly, 30 F.3d 1144, 1149 (9th Cir. 1994). The Third and Ninth Circuits, however, have not chosen to speak in terms of absolutes, i.e., adverse rulings "do not form the basis for a recusal motion," as the Seventh Circuit did in Huntington. Nonetheless, it is clear that all three circuits have now taken the position that virtually every adverse judicial ruling which is alleged as a ground for recusal "properly can be reviewed upon appeal."

See United States v. Bertoli, 40 F.3d at 1413; accord, United States v. Chischilly, 30 F.3d at 1149 (implied); In re Huntington Commons Assoc., 21 F.3d at 158 ("[a]dverse rulings should be appealed").

a. **Appellate review of adverse rulings will not cure the Court of Appeals' failure to provide petitioners with a neutral and detached judge in the first instance.**

If other federal courts read Liteky, as have the Third and Seventh Circuits, and join them in holding that adverse rulings alleged in § 455 motions as grounds for disqualification properly can be reviewed on appeal, then Liteky, as applied, and Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972), are on a collision course.

The question presented in Ward was the constitutionality of the Mayor's participation in the adjudication and punishment of a defendant charged with two traffic offenses, where the Mayor was responsible for the village finances and a substantial

portion of village funds was derived from the mayor's court through fines, forfeitures, costs and fees. In rejecting the argument that any unfairness at the trial level could be corrected on appeal and a trial de novo in the county court, this Court wrote:

> This "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

409 U.S. at 61-62.

If appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator, Concrete Pipe and Prod. of Cal. v. Construction Laborers Pension Trust for S. Cal. Inc., 113 S.Ct. 2264, 2277, 124 L.Ed.2d 539, 561 (1993) (citing Ward), can it be said that judi-

cial rulings which evidence the required degree of favoritism or antagonism to justify disqualification "properly can be reviewed upon appeal," United States v. Bertoli, 40 F.3d at 1413 (emphasis added). To ask the question is to answer it. The remedy by appeal is inadequate in a case where a trial judge wrongfully refuses to disqualify himself. See Berger v. United States, 244 U.S. at 36.

Even if judicial rulings, with or without accompanying opinion, rarely provide valid grounds for a § 455 motion, too much is at stake to allow holdings like those found in Huntington and Bertoli to stand. After all, a fair trial in a fair tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133, 136 (1955).

A judge is bound to decide each case fairly and in accordance with the relevant facts and the applicable law, even when the decision is not what "the home crowd

wants."[22] If particular judicial rulings provide evidence that a judge is unable to "hold the balance nice, clear, and true," Tumey v. Ohio, 273 U.S. 510, 532 (1927), they should be recognized as such by those charged with reviewing decisions against recusal, not brushed aside on grounds that those rulings are not relevant to § 455 or "properly can be reviewed on appeal."

b. The Court should revisit Liteky and establish a standard which District and Circuit Courts can use to gauge whether particular judicial rulings constitute valid grounds for a bias or partiality motion under § 455.

The Court in Liteky enunciated a single test for finding that a judicial ruling constitutes a valid ground for a bias or partiality motion: it must display deep-seated favoritism or antagonism that would

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[22] See Ruth Bader Ginsburg, Reflections on the Independence, Good Behavior and Workload of Federal Judges, 55 Colo. L. Rev. 1, 1-2 (1983); William H. Rehnquist, Act Well Your Part: Therein All Honor Lies, 7 Pepperdine L. Rev. 227, 229-30 (1980)).

render fair judgment impossible. 114 S.Ct. at 1158, 127 L.Ed.2d at 491-92. This test governs only those rulings which do not rely upon knowledge acquired outside the judicial proceedings at hand. Id. Where the judicial ruling shows reliance upon an extrajudicial source,[23] the test is that enunciated in § 455(a): whether there is an appearance of partiality. See Liteky, 114 S.Ct. at 1161, 127 L.Ed.2d at 496 (Kennedy, J., Blackman, J., Stevens, J., and Souter, J., concurring in judgment).

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[23] Although this Court has said judicial rulings "cannot possibly show reliance upon an extrajudicial source," Liteky, 114 S.Ct. at 1157, 127 L.Ed.2d at 490-91, the Seventh Circuit found the opposite to be true in Peacock Records, Inc. v. Checker Records, Inc., 430 F.2d 85, 89 (7th Cir. 1970), cert. denied, 401 U.S. 975 (1971), when it wrote:

> Findings by a trial judge unsupported by the record are evidence that the judge has relied on extrajudicial sources in making such determinations indicating personal bias and prejudice. Cf. United States v. Grinnell Corp., 384 U.S. 653, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

Of the Courts of Appeals which should have applied the "impossibility of fair judgment" standard to rulings alleged as grounds for recusal in two post-Liteky decisions, neither appeared to do so.

In Bertoli, the Third Circuit recited this standard on one page of its opinion, but applied the statutory standard on the next: "We do not believe that a reasonable person, looking at the [intrajudicial] rulings objectively, would conclude that the court was partial." 40 F.3d at 1413.

The Seventh Circuit in In re Huntington Commons Associates avoided this exercise altogether by holding, contrary to Liteky, that adverse rulings do not form the basis for a recusal motion. 21 F.3d at 158. Thus, it did not apply the "impossibility of fair judgment" test to rulings alleged to give rise to reasonable questions about the impartiality of the bankruptcy judge. 21 F.3d at 157-58.

Although its error may have been harmless, the Ninth Circuit applied the wrong standard in Chischilly before concluding that Judge Rosenblatt had not abused his discretion in refusing to recuse himself. 30 F.3d at 1149-50. The test it used was the "impossibility of fair judgment" standard. 30 F.3d at 1149. However, the judicial ruling Chischilly placed at issue in his § 455(a) motion was one which Judge Rosenblatt had made as a state judge on the question of Chischilly's competence to stand trial on unrelated sex charges. Id. Because the alleged partiality arose from an extrajudicial source, "an earlier judicial proceeding[] conducted by the same judge," Liteky, 114 S.Ct. at 1152, 127 L.Ed.2d at 484, the Third Circuit should have used the statutory standard instead.

Because the Courts of Appeals have not spoken with a single voice in their post-Liteky decisions, one that echoes express

and implied standards for judicial rulings in Liteky, and have misapplied or refused to apply those standards, Liteky should be revisited.

This mandamus proceeding provides a vehicle by which this can be done. First, it affords the Court an opportunity to clarify Liteky's standards for judicial rulings, both intra- and extrajudicial, or to adopt a single standard, one which can be properly applied by District Judges in the first instance or by Courts of Appeals on review of decisions against recusal.

Second, the facts in this case, unlike those in Liteky, afford the Court an opportunity "to describe the consequences of [the extrajudicial source] factor in complete detail," 114 S.Ct. at 1157, 127 L.Ed.2d at 490, if it elects to do so.

Facts that might reasonably cause an objective observer to question the impartiality of the successor judge or tend to

show bias or prejudice are embodied in a number of his rulings and circumstances surrounding their entry. Four of these judicial rulings are described below under headings taken from Liteky.

(1) **Judicial rulings alone which show requisite degree of favoritism or antagonism for disqualification.**

In Liteky, the Court said, "judicial rulings alone almost never constitute valid basis for a bias or partiality motion." 114 S.Ct. at 1157, 127 L.Ed.2d at 490 (citing Grinnell,[24] 384 U.S. at 583). One example of such a ruling is the order which summarily denied petitioners' pro se motion to vacate the order disqualifying Godlove. That same order directed the pro se petitioners to respond to the summary judgment motion which Hahn and the

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[24] Grinnell cited Berger which, in turn, cited Ex parte American Steel Barrel Co. for the proposition that the trial judge's alleged bias or prejudice "must be based upon something more than rulings in the case." 255 U.S. at 31.

Bamberger firm filed in the malpractice, fraud, and RICO action three weeks after Godlove was disqualified at their urging on grounds that she would have to testify as a witness at trial.

These facts "tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice," Ex parte American Steel Barrel Co., 230 U.S. at 44, that is, "a bent of mind that may prevent or impede impartiality of judgment," Berger, 255 U.S. at 33-34.

A second example is the order staying all discovery in the fraud on the court case until after the motion for summary judgment filed by the Bamberger firm in the second action was decided. It was entered by the successor district judge before petitioners had an opportunity to be heard. These facts clearly "show the objectionable inclination or disposition of the judge." Berger, 255 U.S. at 35.

(2) Rulings and accompanying opinions which satisfy Liteky standard for recusal

Facts presented in this case draw into question the soundness of generalizations found in the Court's opinion in Liteky, like those quoted below:

> In and of themselves (i.e., apart from surrounding comments or accompanying opinion), [judicial rulings] cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved.

114 S.Ct. at 1157, 127 L.Ed.2d at 490.

The first of many judicial rulings that evidence deep-seated favoritism or antagonism and show reliance on an extrajudicial source[25] is the order disqualifying Godlove in the malpractice, fraud and RICO action. Findings that the substance of a threatening telephone call from Ira Spanierman's lawyer is "in dispute" and that Godlove's testimony on the malpractice and RICO

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[25] See footnote 23, supra.

claims is "necessary" (which appear in an accompanying opinion) are not supported by any evidence in the record.

Another such ruling is the denial of Plaintiff's Motion for Imposition of Sanctions Under Rule 11 and 28 U.S.C. § 1927 for Filing Frivolous Motions to Disqualify Counsel and Stay Discovery. Two findings accompanied this ruling: (1) defendants' motions to disqualify counsel were well-founded, as evidenced by the order granting those motions, and (2) "plaintiff's request to stay discovery is extraneous, given that all discovery is already stayed." The latter finding reveals that denial of plaintiff's sanctions motion was based on the successor judge's reading its title, not the motion itself or arguments made in supporting or answer briefs.

The conduct of the successor judge in this instance is not unlike that of the district judge in Webbe v. McGhie Land

Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977), who announced that the defendant was "stuck" after he heard the argument of plaintiffs' counsel on their motion for summary judgment, but before he considered relevant evidence in the record or allowed defense counsel to make his argument. The Tenth Circuit, relying on § 455(a) and finding no reasonable likelihood that the judge could preside over the trial of that case in a fair and impartial manner, concluded that forced recusal and reassignment of the case to a different judge was required. 549 F.2d at 1361.

4. **The respondent judges should have recused themselves under § 455(a).**

The constitutional right to have "a neutral and detached judge" preside over judicial proceedings, Ward, 409 U.S. at 62, is not confined to trial courts, but extends to reviewing courts. See Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986). The same is true of obligations

imposed on the federal judiciary by the 1974 revision of § 455. See Liteky, 114 S.Ct. at 1153, 127 L.Ed.2d at 486.

a. **Judges Kanne and Easterbrook can be identified with two decisions alleged to be the "extrajudicial sources" of the unreasoning bias and prejudice that was exhibited by the successor district judge.**

Petitioners urged the Seventh Circuit to find that the judge's unreasoning prejudice[26] against their attorney[27] derived

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[26] There is a difference between a judge's unreasoning prejudice against a lawyer and well-founded impatience with a lawyer's obstructive tactics. Walberg v. Israel, 766 F.2d 1071, 1077 (7th Cir), cert. denied, 474 U.S. 1013 (1985).

[27] Petitioners also urged that court to follow United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993), and find that prejudice against Godlove could reasonably be imputed to petitioners under the circumstances summarized below:

> Were this not so, why would [the successor judge] force petitioners to proceed pro se on a summary judgment motion which purportedly raised only issues of law? Why would he strip petitioners of counsel when Godlove said she would not testify at trial, particularly where no defendant sustained his evidentiary burden on motions to disqualify her?

from "extrajudicial sources" -- the trial and appellate court opinions in Godlove[28] which Hahn and the Bamberger firm attached to their motion to disqualify counsel. Such a finding was a prerequisite to that court's concluding that the successor district judge should have disqualified himself. See Liteky, 114 S.Ct. at 1155, 127 L.Ed.2d at 488 ("extrajudicial source" is the only common basis for establishing disqualifying bias or prejudice under § 455(a) and § 455(b)(1)).

Because Circuit Judges Easterbrook and Kanne served on the panel that had, at one and the same time, affirmed and rendered the Godlove opinions, each had an interest in issues of fact he was called upon to decide in the mandamus proceeding. This interest was disqualifying under § 455(a).

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[28] These opinions reveal that Godlove made an ethical decision, right or wrong, and that four federal judges made a legal decision. Petitioners have paid for both.

Although the issue appears to be one of first impression for this Court, a similar question was before the court in City of Mobile v. Grayson, 220 Ala. 349, 125 So. 221 (1929). In Grayson, the Supreme Court of Alabama was asked to decide whether the judge should have recused himself on the ground of interest in a case where allegations were made that a power company, of which he was a customer, had collected money in excess of the legal rate. Finding recusal proper where no jury had been demanded, the court held:

> [A]n interest in the question of law presented does not disqualify a judge from sitting, or justify his recusation; but our decisions founded upon the stern morality of the common law, designed to preserve the confidence of the people in the courts as impartial tribunals in the administration of justice, disqualify a judge from sitting in a case where he is interested in the issues of fact which he is called upon to determine, though his conclusion may not affect, immediately, his personal interest.

125 So. at 222.

The holding in Grayson is consistent with principles enunciated by this Court in In re Murchison:

> [O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.

349 U.S. at 136.

One circumstance Circuit Judges Kanne and Easterbrook should have considered is the fact that they had been asked to find that remarks found in the Godlove opinions (though irrelevant to the issue of whether Godlove should be disqualified) revealed such deep-seated antagonism on their part and that of two other federal judges as to make fair judgment by a fifth (i.e., the successor district judge) impossible.

Also deserving of consideration under Murchison were certain relationships: the nexus between the Godlove opinions and the

mandamus action and the role each of those judges had played or was to play in prior and current proceedings. Cf. Russell v. Lane, 890 F.2d 947, 948 (7th Cir. 1989) ("it is considered improper --indeed is an express ground for recusal, see 28 U.S.C. § 47 -- in modern American law for a judge to sit on the appeal from his own case."); Rice v. McKenzie, 581 F.2d 1114, 1117 (4th Cir. 1978) (where an appeal is taken from Phillip to Phillip, there is a reasonable basis for questioning Phillip's impartiality on the appeal).

The fact that Judge Cudahy was not on the Godlove panel should not have ended his inquiry under § 455 or Murchison. Relationships and circumstances he should have evaluated include his sitting on a multimember panel with judges who were on that panel and the collegial decisionmaking process itself. Because petitioners were entitled to an impartial tribunal

whether it consists of one man or three and there is no way to gauge the influence Judges Easterbrook and Kanne had on him, Judge Cudahy's recusal was mandated. See Berkshire Employees Ass'n of Berkshire Knitting Mills v. National Labor Relations Bd., 121 F.2d 235, 239 (3d Cir. 1941); see also Aetna Life Ins. Co. v. Lavoie, 475 U.S. at 831 (Brennan, J., concurring).

b. **Respondents' impartiality was placed in issue when they did not take into consideration a Reply Brief petitioners filed before denying their Petition.**

In the Reply Brief they were allowed to file, petitioners addressed issues which defendants raised in their Response, among them waiver and timeliness arguments.

Though reference is made to their considering the Petition for Writ of Mandamus and defendants' Response, respondents say nothing in the Order denying the Petition which indicates that they read, much less considered, the Reply Brief (appendix at

2a). That fact, when gauged by Liteky's impossibility of fair judgment test or the statutory standard, should be sufficient to warrant respondents' forced recusal. Cf. Webbe v. McGhie Land Title Co., 549 F.2d at 1361. Their failure to allow the petitioners to be heard on what may have been dispositive issues "tend[s] to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice," Ex parte American Steel Barrel Co., 230 U.S. at 44, or partiality.

c. **When petitioners sought a rehearing, respondents had actual knowledge of the facts alleged to indicate their interest or bias.**

Circuit Judges Easterbrook and Kanne may have had a lapse of memory about serving on the panel that rendered one Godlove opinion and affirmed another, at the time petitioners' mandamus action was assigned to them. That, however, would not excuse their individual or collective failure to

recuse themselves on grounds of interest or bias. Section 455(a), as this Court has said, mandates recusal "even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." Liljeberg, 486 U.S. at 860-61.

Had they disqualified themselves before deciding the ultimate question presented by the mandamus petition, two different judges would have joined Judge Cudahy in determining whether the Godlove opinions constituted sources of what petitioners characterized as unreasoning prejudice on the part of the successor district judge.

When Circuit Judges Kanne and Easterbrook reviewed the petition for rehearing, after denying the mandamus petition, each obtained actual knowledge of his relationship to and involvement with two alleged "extrajudicial sources" of prejudice.

They and Judge Cudahy also knew of other facts alleged to be disqualifying under § 455(a), e.g., their failure to consider the Reply Brief or apply Liteky, as written.[29] Denial of the petition for rehearing signalled respondents' refusal to disqualify themselves so issues raised in the mandamus proceeding could be resubmitted to a panel of judges whose impartiality could not reasonably be questioned.

5. Vacatur of respondents' orders and those entered by the Chief Judge and his successor in the defendants' favor is proper.

Where a district judge has violated the duty imposed on him or her by § 455, the Court of Appeals must evaluate the significance of the violation and fashion the remedy that will best serve the purpose of the legislation. Liljeberg, 486 U.S. at

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[29] If a judge demonstrates that he is unwilling to carry out the law in a particular case, reassignment is appropriate. United States v. Torkington, 874 F.2d 1441, 1446 (11th Cir. 1989).

862. A fortiori, this Court should sit in judgment of § 455 violations occurring in the Courts of Appeals, evaluate their significance, and fashion proper remedies.

Assuming the Court chooses to exercise its supervisory powers, the final question presented for review in this proceeding is whether interlocutory rulings made by a judge whose recusal is mandated should be vacated if they favor parties favored by his bias, prejudice, or partiality.[30]

Such a remedy would promote public confidence in the courts and, thus, serve the purpose of § 455. It would also be in the interest of judicial economy. Not all prior rulings would have to be vacated. Nor would the successor judge be required to decide collateral issues, e.g. whether particular rulings show actual impropriety

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[30] Cf. Peacock Records, Inc. v. Checker Records, Inc. 430 F.2d 85, 89 (7th Cir. 1970) ("bias and prejudice renders invalid any resulting judgment in favor of the party so favored").

or prejudice. But cf. United States v. Murphy, 768 F.2d 1518, 1541 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986).

In the circumstances of this case, vacatur of respondents' Orders and rulings entered in defendants' favor by the Chief Judge and his successor is a proper remedy for their § 455 violations.

CONCLUSION

For the reasons set forth above, the petitioners submit that the Court should decide the questions presented for review and issue the writ sought.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

August 5, 1994

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

IN THE MATTER OF: THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of ROBERT W. HUTCHINSON, deceased, Petitioner.	Petitions for Writ of Mandamus Southern District of Indiana, Evansville Division.
No. 94-1174	No. 90 C 44 & 90 C 43
	Larry J. McKinney, Judge.
IN THE MATTER OF: THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of ROBERT W. HUTCHINSON, deceased, and ANNE E. HUTCHINSON, Individually, Petitioners.	
No. 94-1523	

Upon consideration of:

1. **"PETITION FOR WRIT OF MANDAMUS"** filed on January 25, 1994, by counsel for the petitioners.

2. **"RESPONSE OF BAMBERGER DEFENDANTS TO PETITION FOR WRIT OF MANDAMUS"** filed on February 11, 1994, by counsel.

3. **"PETITION FOR WRIT OF MANDAMUS"** filed on March 11, 1994, by counsel for the petitioners.

4. **"RESPONSE TO PETITION FOR WRIT OF MANDAMUS"** filed on March 29, 1994.

IT IS ORDERED that #1 and #3 are **DENIED.**

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

July 27, 1994

By the Court:

IN THE MATTER OF: THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of ROBERT W. HUTCHINSON, deceased and ANNE E. HUTCHINSON, Individually, Petitioners.	]	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
Nos. 94-1174 and 94-1523	]	Nos. 90 C 43 and 90 C 44
	]	Larry J. McKinney, Judge

Upon consideration of:

1. **PETITIONERS' REQUEST FOR JUDICIAL NOTICE** filed 3/11/94, by counsel.

2. **PETITIONERS' REPLY BRIEF** received 4/11/94, by counsel.

IT IS ORDERED that #1 is **GRANTED** pursuant to the court's 7/22/94 order that consolidated these mandamus petitions for disposition.

IT IS FURTHER ORDERED that #2 is **GRANTED** and the clerk of this court will accept the tendered reply for filing instanter.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 14, 1994

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

IN THE MATTER OF: THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of ROBERT W. HUTCHINSON, deceased and ANNE E. HUTCHINSON, Individually, Petitioners.	] Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.] Nos. 90 C 41 and 90 C 44
Nos. 94-1174 and 94-1523	] Larry J. McKinney, Judge

Upon consideration of the **"PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC"** filed 8/19/94, by counsel for the petitioners,

IT IS **ORDERED** that the Petition for Rehearing is **DENIED.**